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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 19

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT,

v.

FRANCISCO MENDOZA-MARTINEZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum opinion of the district court dated September 22, 1960 (R. 37-44), holding that appellant is not estopped from denying that appellee is a national and citizen of the United States and affirming a prior holding (dated September 24, 1958) (R. 5-13) that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional, is not reported.

JURISDICTION

The judgment of the district court was entered on September 22, 1960 (R. 37). Notice of appeal to this Court was filed in the district court on November 4, 1960 (R. 49), and probable jurisdiction was noted on February 20, 1961 (R. 51). The jurisdiction of this Court to review on direct appeal the decision of a district court holding an act of Congress unconstitutional is conferred by 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether the prior indictment and conviction of appellee for violating Section 11 of the Selective Service and Training Act of 1940, as amended, estops the government from denying, in this suit, that appellee is a national and citizen of the United States.

2. Whether Congress had the constitutional power to provide, as it did in Section 401(j) of the Nationality Act of 1940 for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading or avoiding service in the armed forces of the United States.

STATUTES INVOLVED

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677) and September 27, 1944 (58 Stat. 746), provided in pertinent part:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

The Immigration and Nationality Act of 1952 (66 Stat. 163, 267-268, 8 U.S.C. 1481), provides in pertinent part:

SEC. 349. (a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * * * *

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

* * * * *

The Selective Service and Training Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844, *et seq.*, provided in pertinent part:

> SEC. 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.
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> * * * * * *
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> SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any

person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.

* * * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly

hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

STATEMENT

1. This action was instituted by appellee in 1955, under Section 503 of the Nationality Act of 1940, as amended, for a declaration that he is a citizen of the United States; he placed his suit on the sole ground that Section 401(j) of the Nationality Act, under which he had been deemed by the administrative authorities to have lost his United States citizenship, was unconstitutional. No other claim was raised in the complaint. On September 6, 1955, the District Court for the Southern District of California, Northern Division, issued its Memorandum and Order rejecting appellee's con-

tention that Section 401(j) was invalid.[1] In a *per curiam* opinion of November 2, 1951, the Court of Appeals for the Ninth Circuit affirmed. *Mendoza-Martinez* v. *Mackey*, 238 F. 2d 239. Appellee filed a petition for a writ of certiorari on December 12, 1956 (No. 623, O.T. 1956), and on April 7, 1958, this Court granted the petition (then renumbered as No. 51, O. T. 1957), vacated the judgment of the Ninth Circuit, and remanded the case to the District Court for reconsideration in the light of the decision in *Trop* v. *Dulles*, 356 U.S. 86. See 356 U.S. 258.

2. Upon reconsideration in the District Court, the parties stipulated the facts as follows (R. 2-3): appellee was born in the United States on March 3, 1922, and was a citizen of the United States at birth; he is now and has been since birth also a citizen of the Republic of Mexico; in 1942, he departed from the United States and went to Mexico for the sole purpose of avoiding service in the armed forces of the United States, and remained in Mexico for that purpose until November 1946; he was convicted in the United States District Court for the Southern District of California on June 23, 1947, upon a plea of guilty, for violation of Section 11 of the Selective Service and Training Act of 1940, and sentenced to imprisonment for a period of one year and one day.[2]

On February 3, 1953, appellee was served with a warrant of arrest in deportation proceedings and after

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[1] Findings of fact and conclusions of law were filed on September 22, 1953.

[2] The indictment in that criminal proceeding is summarized and discussed in Point I of the Argument, *infra*, p. 18, *ff*.

a hearing was ordered deported from the United States as an alien. An appeal was dismissed by the Board of Immigration Appeals on October 23, 1953.

The District Court—finding that there was no issue of fact to be tried (R. 4) and that under the terms of Section 401(j) appellee had lost his nationality before his return to this country in 1946 (R. 7, 14-15)—held, in the light of *Trop* v. *Dulles*, *supra*, that Section 401(j) was beyond the power of Congress and could not affect appellee's citizenship. Appellee was granted the relief he sought (R. 5-13).

On direct appeal under 28 U.S.C. 1252, this Court, after oral argument, *sua sponte* raised the issue of possible collateral estoppel and remanded the cause to the District Court with permission to the parties to amend the pleadings to put in issue the question of whether the indictment and conviction of appellee, in 1947, collaterally estopped the appellants from now claiming that appellee had lost his United States nationality while in Mexico (R. 20). 362 U.S. 384.

3. On remand, appellee amended his complaint to allege, in addition to his claim that Section 401(j) was invalid, that "the government of the United States has admitted the fact of his United States citizenship by virtue of the indictment and judgment of conviction [referred to above] and is therefore collaterally estopped now to deny such citizenship" (R. 22). The government's answer to this amended complaint (R. 30-32) denied the averment of collateral estoppel (R. 31) and reasserted its defense that the statute was constitutional. The parties again stipulated (R. 33-35) the facts summarized above, p. 7, and included the indictment.

judgment, and commitment in appellee's criminal conviction (R. 35). No new evidence bearing on the issue of constitutionality was introduced, and it was again agreed that there were no issues of fact to be tried (R. 35). The two legal issues were agreed to be the question of collateral estoppel and the validity of Section 401(j) (R. 35-36).

In a Memorandum and Order of September 22, 1960, (R. 37-44), the District Court rejected appellee's claim of collateral estoppel, based on the argument that the Selective Service and Training Act, as amended, could have been applicable to him only if he were a citizen. Finding that there was nothing in the record to indicate that his liability for induction was based upon his United States citizenship, the court held that, since the Selective Service and Training Act applied to all male persons residing in the United States, appellee was liable for induction whether he was a United States citizen or only a resident; that, in either event, if he left the United States to avoid the draft, he was subject to prosecution upon his return; and that therefore the 1947 prosecution did not involve the issue of his nationality. Accordingly, the court ruled, the government was not estopped from now asserting that appellee had lost United States nationality under Section 401(j) while in Mexico (R. 37-43).

The court then reaffirmed its prior holding that Section 401(j) was unconstitutional (R. 43). It held further that the provision for automatic divestiture of citizenship was essentially penal in character and deprived appellee of procedural due process (R. 43-44).

Formal findings of fact, conclusions of law, and a

judgment carrying into effect the court's holdings were entered on October 19, 1960 (R. 45-48).

SUMMARY OF ARGUMENT

I

On the prior appeal, this Court remanded the case to the District Court to determine whether appellee's 1947 conviction for draft evasion estops the government from asserting, in the present suit, that he has lost his United States citizenship. 362 U.S. 384. In our view, the determination by the court below that the government is not estopped is clearly correct.

A. The 1947 conviction for evading the draft (on appellee's plea of guilty) was not based in any way upon his citizenship status after the enactment of Section 401(j) in 1944. In the first place, the Selective Training and Service Act of 1940, under which he was convicted, made all *residents* within the prescribed classes —including aliens—eligible for the draft, and the indictment in appellee's case did not refer to him as a citizen but simply as "a male person within the class made subject to selective service" who had registered and then departed the country in November 1942 to evade service. It was appellee's status as an American resident in 1942—not his status as an American citizen or national (at that or any other time)—which lay beneath his liability for service; since he was plainly a resident, citizenship was not in issue.

Secondly, the gravamen of appellee's criminal offense was his failure to report for induction in December 1942—prior to the adoption of Section 401(j) in September 1944—and his liability to answer for that

offense would continue even though he later gave up his American residence or lost his American citizenship. The count to which he pleaded guilty did refer to his remaining away until November 1946, but this reference to a period after September 1944 was an unnecessary averment having only a tangential connection with the crime of draft evasion in 1942, with which he was charged. In any event, even if appellee's criminal liability were premised on his evading service for the whole period from 1942 to 1946, his citizenship would not have been involved since, from all that appears, he continued as a resident and would have remained liable in that capacity.[3]

B. Since the matter of appellee's citizenship, either before or after the adoption of Section 401(j) in 1944, was not necessarily, nor in actual fact, determined by his draft evasion conviction in 1947, the doctrine of collateral estoppel does not bar the government from denying, in this suit involving a different cause of action, that he is a United States citizen. Cf. *Emich Motors* v. *General Motors*, 340 U.S. 558, 568-569.

II

Appellee admits that he went to Mexico (of which he is also a national), and remained there until after the end of the fighting in World War II, for the sole purpose of evading military service. He thus falls squarely under Section 401(j) of the Nationality Act of 1940, which decreed denationalization in such cir-

[3] There is no reason to believe that appellee's punishment of a year and a day was increased because he remained in Mexico after September 1944.

cumstances. The only remaining issue in the case is the constitutionality of that provision. We submit that it was a valid enactment, within the power of Congress.[4]

A. In a series of decisions this Court has established that Congress may, in appropriate circumstances, provide expatriation as the consequence of designated acts voluntarily performed by an American citizen, regardless of whether he subjectively intends to give up or repudiate his United States citizenship or is aware that he will lose American nationality by performing the act. *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491; *Perez* v. *Brownell*, 356 U.S. 44. This principle was not rejected in *Trop* v. *Dulles*, 356 U.S. 86, which invalidated Section 401(g) of the 1940 Nationality Act (loss of nationality upon conviction for desertion). The majority of the Court made it clear that the *Perez* rule remained unimpaired, and that *Trop* was decided on considerations pertinent to that particular subsection.

B. Under the general *Perez* principle, Section 401(j) is sustainable as a necessary and proper means of effectuating the foreign affairs power, the war power, and the inherent power of the United States to retain its sovereignty and jurisdiction over its citizens.

1. The statute has a long history. A provision in effect from 1865 to 1940 prescribed forfeiture of "rights of citizenship" for those who left the district of registration *or the country* to evade the draft. It

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[4] The companion case of *Rusk* v. *Cort*, No. 20, involves the validity of the comparable provision in the Immigration and Nationality Act of 1952—Section 349(a)(10)—which is the same (with respect to the present cases) as Section 401(j).

was legislatively and administratively treated as a full expatriation statute. Section 401(j) was added to the Nationality Act in 1944 because draft evasion in World War II revealed the same need as had existed in the earlier emergencies.

2. Since Section 401(j) applies *only* to those draft evaders who leave the country, it has a direct relationship to foreign affairs and represents a reasonable Congressional exercise of the power over foreign affairs. American history teaches the international difficulties which can arise from the efforts of one country to compel or induce its citizens in another country to return to perform military service. The same type of problems could develop if the United States were to seek the fugitive draft-evader's return from the country to which he has fled. The difficulties would be multiplied if the evader were also a national of the country in which he sought refuge—as in the present case and most others under Section 401(j). On the other hand, by expatriating those who depart with draft-evasion as their purpose, Congress has eliminated at the outset any further claim this country could have to their services, and by the same token has reduced the danger and area of potential conflict with the nations to which they have gone.

3. Section 401(j) is also sustained by its close and direct relationship to the war power and the national defense. Unlike desertion, which carries the sanction of court-martial and imprisonment, no similar primary check exists to deter individuals who would otherwise flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country

cannot be apprehended and imprisoned for their departure or failure to return. Only if they return to this country, after they have accomplished their purpose and avoided service in time of danger, would it be possible to enforce against them the criminal sanctions of the selective service laws. This would not aid in raising an army when it is needed, and Congress reasonably felt that, for the difficult task of raising an army in wartime, it needed the immediate deterrent represented by loss of nationality for evasion by flight.

4. Congress also has the right to decide that it will sever the allegiance of men who reject all authority, sovereignty, and jurisdiction of this country over them. The draft-evader who seeks a foreign refuge deliberately keeps himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his high duty. He is repudiating not only his military obligation but his wider obligation as a citizen to submit to this nation's justice; he rejects all authority of the United States over him, not merely his duty to serve in a military capacity. Dissolution of his ties to the nation is not an arbitrary consequence to attach to this voluntary choice.

C. Section 401(j) does not violate the Due Process Clause or the Eighth Amendment. It does not impose any improper punishment.

1. Citizenship cannot be forfeited administratively under Section 401(j) in any final sense; a *de novo* judicial trial is available under Section 503 of the Nationality Act, a right of which appellee has availed himself. In that judicial trial, the government's burden is heavy, comparable to the burden in a criminal trial.

Gonzales v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. This careful procedure involves no denial of due process. Nor, as pointed out above (*supra*, p. 12), is there any denial of due process because appellee may not have known that he would expatriate himself by voluntarily leaving this country and remaining abroad in order to evade the draft.

2. The statute does not impose any punishment on appellee. More than the desertion provision involved in *Trop*, Section 401(j) is concerned with regulation of the future rather than with punishment for past conduct; it is directed toward the prevention of embroilments with foreign countries, and inducing and goading evaders to fulfill their military responsibilities; subject to a judicial determination of the facts, it simply ends the citizenship of those who substantially repudiate that status by rejecting all American jurisdiction and authority over them. The section has been interpreted, both administratively and judicially, in non-penal fashion so as to affect only those fugitives whose draft-evasion was the dominant and primary motivation of their flight abroad.

Punishment is not involved merely because Congress imposes a non-penal disability or disqualification, following specified criminal conduct. Civil regulations based on past conduct are not invalid, or transformed into punitive sanctions, where the legislators have a valid non-penal objective and do not intend to inflict punishment, even though some deterrence of criminal conduct may also ensue. Scarcely any civil consequence of statutes relating to licensing, damages, or the like, can avoid—or need avoid—incidental effects

of deterrence. Cf., *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603; *Hawker* v. *New York*, 170 U.S. 189; *Helvering* v. *Mitchell*, 303 U.S. 391; *Harisiades* v. *Shaughnessy*, 342 U.S. 580; *Rex Trailer Co.* v. *United States*, 350 U.S. 148.

Even if punishment is thought to be imposed by Section 401(j), it is not an invalid or a cruel and unusual punishment. In appellee's case, statelessness is not involved, since he is a national of Mexico. Dual nationality seems also to be characteristic of the bulk of those to whom the section has been applied. And if a criminal trial is a prerequisite for punishment, that requirement is fulfilled here by appellee's prior conviction for draft evasion.

ARGUMENT

Under its policy of avoiding serious constitutional issues unless absolutely necessary for determination of the case before it (see, *e.g.*, *Spector Motor Service Inc.* v. *McLaughlin*, 323 U.S. 101, 105; *Boynton* v. *Virginia*, 364 U.S. 454), the Court remanded this case to the district court with permission to the parties to raise the issue of whether the United States, by reason of its 1947 prosecution of appellee under the Selective Service and Training Act, is now estopped from denying that he is a United States citizen. We believe that the ruling of the district court that the government is not estopped is plainly correct. Since the issue is a non-constitutional one, we discuss that question first, even though the government prevailed on the point in the court below. Then, since, in our view, the constitutional issue must now be met in this case, we set out anew the considerations which we believe support the

constitutionality of Section 101(j) of the Nationality Act of 1940.[5]

I

Appellee's 1947 Conviction for Draft Evasion Does Not Estop the Government From Denying That He Is a Citizen of the United States.

Finding that "[t]he issue of collateral estoppel is a question that clouds the underlying issue of constitutionality", this Court, when the case was before it in the October Term 1959, remanded it to the district court to afford the parties an opportunity to litigate that issue and obtain its adjudication. *Mackey* v. *Mendoza-Martinez*, 362 U.S. 384, 387.[6] Pursuant to the order of remand, the issue was raised (R. 21-23), briefed by the parties, and considered by the court below. *Supra*, pp. 8-9. That court found "that the prior criminal proceedings against [appellee] did not necessarily or in actual fact make any determination as to [appellee's] citizenship and, therefore, the doctrine of collateral estoppel is not applicable" (R. 41-43). As we now show, this determination was entirely correct. The doctrine of collateral estoppel is applicable only to facts actually put in issue—not to those which merely

[5] This constitutional issue has previously been briefed and argued before this Court four times: in *Gonzales* v. *Landon*, 350 U.S. 920, where the Court found it unnecessary to reach the question since it ruled that there was no clear and convincing evidence that the claimant had remained outside the country to avoid military service; twice in *Perez* v. *Brownell*, 356 U.S. 44, where the issue was not reached since loss of nationality was found to rest on the fact that the claimant had voted in a foreign election; and once before in this litigation, 362 U.S. 384.

[6] The Court raised the issue *sua sponte* after oral argument, requesting that the parties submit memoranda on the question. See Supplemental Memorandum for Appellants, No. 29, O.T. 1959.

might have been litigated. Appellee's citizenship after the enactment of Section 401(j) of the Nationality Act (in September 1944) was not a necessary issue nor was it put in issue in the prosecution for draft evasion.

A. *Appellee's conviction for draft evasion in 1947 was not premised in any way upon his citizenship status after the enactment of Section 401(j) of the Nationality Act in 1944.*

1. On June 11, 1947, a three-count indictment was returned in the District Court for the Southern District of California charging appellee with draft evasion, in violation of Section 11 of the Selective Service Act of 1940, 54 Stat. 885, as amended, 55 Stat. 844, *et seq.* (R. 24-26, 35; *supra*, pp. 7, 8-9). The first count of the indictment (R. 24-25), the one to which appellee pleaded guilty (R. 27-28), first alleged that appellee was "a male person within the class made subject to selective service", and that he had registered as required by law, and then charged that:

> [O]n or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 4, 1946.

Count two charged appellee with failure to report for induction on December 11, 1942, as ordered (R. 25).

Count three charged that appellee failed to keep his draft board advised where mail would reach him (R. 25-26).

District Judge Yankwich, in sentencing appellee to imprisonment for a year and a day upon his plea of guilty to count one, observed (R. 27-28):

> It Is Further Ordered that the second and third counts be dismissed, it appearing to the court that the offenses charged therein arose out of the same circumstances.

2. The prosecution was thus centered upon appellee's evasion of his liability for induction, which in turn was based on his status in the last months of 1942. He was "a male person within the class made subject to selective service", a class which comprised both citizens and non-citizens. The Selective Training and Service Act of 1940, 54 Stat. 885, as amended, December 20, 1941, 55 Stat. 844, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens whether residing in the United States or not, were subject to the draft (see *supra*, p. 4). Appellee, as a male person residing in the United States who was (in 1942) of the prescribed age, was liable for induction, regardless of whether he happened to be or continued to be a citizen of the United States. At no time in the prosecution did the government assert appellee's citizenship as a basis, however remotely, for his liability for induction into the armed services; nor did the statute require such an assertion. As a resident of the United States, appellee was in the statutory class made eligible for military training and serv-

ice, completely apart from his citizenship status. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 171-174.

3. Moreover, as appears from the dismissed second count together with Judge Yankwich's notation (quoted *supra*, p. 19), appellee was ordered to report for induction on December 11, 1942, and the charge in the first count, of evasion of service, would necessarily encompass failure to obey that order. As a result of the issuance of the order to report for induction, appellee's potential liability as a member of the statutory class had ripened into an actual liability. He was thereafter criminally liable for failure to obey this order to report, and he could not cast off this criminal liability, or be relieved of it, by a change of status after the date of enactment of Section 401(j) in 1944. A resident alien, who was liable for induction and absented himself from the United States during time of war, would be subject to prosecution for draft evasion upon his return to this country. Obviously, a citizen who departed to evade the draft and returned as an alien is in no better position. The critical factor is that both citizens and non-citizens *who were liable for induction prior to departing* remained subject to prosecution even while abroad or after their return. In short, a change in status, even if effective for the future, would not operate retroactively to erase appellee's criminal liability for acts already committed with regard to the previously issued order to report; nor would such a change in status for the future have any effect on that prosecution or be involved in it.

4. The count to which appellee pleaded guilty did also allege that he remained away until November 1,

1946, *i.e.*, after September 27, 1944 (the date of enactment of Section 401(j)).[7] However, as the allegations of that count make clear (*see supra*, p. 18), the gist of the crime charged was evasion by leaving the country in 1942. Appellee's action in remaining abroad for four years was merely a continuation of this offense, and the reference to the termination date of his stay abroad could be treated as mere surplusage, if necessary, at least to the extent that it charged remaining abroad after the date of divestiture of appellee's citizenship. Indeed, the charge in the indictment would have been made out by proof of departure without any proof of remaining abroad at all, much less proof of a four year stay. Appellee did not raise any defense of limitations to the 1947 prosecution. At that time, the period of limitations was three years (18 U.S.C. (1946 ed.) 582), but it would be tolled for a person fleeing from justice (18 U.S.C. (1946 ed.) 583, now 18 U.S.C. 3290). Even if only the three-year period applied to appellee's case without enlargement because he fled the country, the indictment in April 1947 would cover a time (within the three-year period) which antedated the adoption of Section 401(j) on September 27, 1944, *i.e.*, the period between April 1944 and September 27, 1944. No one claims that he had lost his United States nationality during that period.

There is no support for appellee's claim that the

[7] The government contends that appellee was expatriated after the enactment of section 401(j) in 1944. A return during the conduct of hostilities might have weighed heavily in his favor, at least as an evidentiary matter, on the requisite intent or motive required by the statute. See *infra*, pp. 59-61.

period of time he remained abroad inevitably influenced the penalty imposed. As the court below observed, there is "nothing in the record to support any inference that the trial judge increased the punishment which would have otherwise been imposed absent the fact that [appellee] remained in Mexico after September 27, 1944" (R. 42-43). Appellee was sentenced to a year and a day on the first count, the second and third counts having been dismissed, although the maximum punishment which could have been imposed upon him was five years imprisonment and or a $10,000 fine.[8]

As both a practical and legal matter, therefore, appellee's status after the date of enactment or application to him of Section 401(j) was in no way involved

[8] As revealed by the following table, appellee's sentence is about average for draft evasion convictions during the period 1940-1946 (see Enforcement of the Selective Service Law, Special Monograph No. 14 (1950), p. 93):

Table No. 11. All convictions, excluding professed religious or conscientious objectors convicted, by types of sentences from Oct. 16, 1940, to June 30, 1946

Type of sentence	Oct. 16, 1940, to June 30, 1942	July 1, 1942, to June 30, 1943	July 1, 1943, to June 30, 1944	July 1, 1944, to June 30, 1945	July 1, 1945, to June 30, 1946	Total
Fine only	18	114	31	21	24	208
Probation	422	809	696	444	236	2,607
1 month or less	130	136	124	68	59	517
More than 1 month to and including 6 months	265	277	194	145	177	1,058
More than 6 months to and including 1 year and 1 day	223	304	271	221	216	1,235
More than 1 year and 1 day to and including 2 years	267	372	451	468	300	1,858
More than 2 years to and including 3 years	142	329	511	397	147	1,526
More than 3 years to and including 4 years	31	86	91	104	26	338
More than 4 years to and including 5 years	30	89	94	89	17	319
More than 5 years		1	1	4		6
Total	1,528	2,517	2,464	1,961	1,202	9,672

in the criminal prosecution, since no part of his conduct after that date was an element of the crime with which he was charged.

5. Furthermore, changes in the citizenship status of individuals liable to induction were in many cases of no relevance to the continued application of the selective service laws to such persons, since residence was also a premise for liability to service. As we have pointed out (*supra*, pp. 19-20), the jurisdiction of this country's laws over such persons was not based solely upon the tie of citizenship, but also upon residence. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 171-174. For instance, aliens abroad, including alien draft evaders, who still claimed residence in this country would continue to be subject to selective service even while they remained abroad.

In sum, appellee's citizenship (past or present) would not necessarily be involved at all in the charges against him in the 1947 criminal prosecution and conviction; his citizenship was not in fact involved in view of his plea of guilty; and his citizenship after September 27, 1944 (the date of enactment of Section 401(j)) was certainly not involved. Accordingly, the 1947 judgment of conviction was not premised in any respect upon his citizenship status after September 27, 1944.

B. *Since the matter of appellee's citizenship, either before or after the adoption of Section 401(j), was not necessarily, nor in fact, determined by his conviction for draft evasion, the doctrine of collateral estoppel does not bar the government from denying that appellee is a citizen of the United States.*

Collateral estoppel, an aspect of the broader doc-

trine of *res judicata*, is premised upon the assumption that the precise issue in question has necessarily, or in fact, been litigated and decided in a prior proceeding on a different cause of action between the same parties. See *e.g.*, *Packet Co.* v. *Sickles*, 5 Wall. 580, 592; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353, 367; *Fayerweather* v. *Ritch*, 195 U.S. 276, 307; *Frank* v. *Mangum*, 237 U.S. 309, 333-334; *Emich Motors* v. *General Motors*, 340 U.S. 558, 568-569; *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 90-91, 99 (fn. 6); *Yates* v. *United States*, 354 U.S. 298, 336; *Hoag* v. *New Jersey*, 356 U.S. 464, 470. As the principle has generally been defined: "[w]here a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action * * *". Restatement, *Judgments*, § 68(1).

Unlike the doctrine of *res judicata* from which it derives, collateral estoppel renders the prior judgment conclusive, not as to all issues which could have been tendered and resolved, but only as to those matters directly put in issue and actually litigated. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353; *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316, 319; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 671.[9]

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[9] As this Court, in the leading case of *Cromwell* v. *County of Sac*, *supra*, at 352-353, articulated the distinction between the use of a former adjudication as an absolute bar to a second action (*res judicata*), and its use to bar relitigation on the same issue in a second and different cause of action (collateral estoppel):

> * * * there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel

In the instant case, therefore, where there is no identity between the causes of action and thus no basis for the application of *res judicata*, the government would be estopped from denying that appellee is a citizen only if that issue was "distinctly put in issue and directly determined" in the prior criminal conviction. *Frank* v. *Mangum*, 237 U.S. 304, 334; *Emich Motors* v. *General Motors*, 340 U.S. 558, 569. But, as we have discussed (*supra*, pp. 18-23), the judgment of conviction for draft evasion was not based upon a resolution of appellee's citizenship status at all—and certainly not after the point in time when Section 401(j) would apply to divest him of that citizenship. Hence even if this Court were to conclude that the judgment of conviction might somehow have involved appellee's citizenship after September 27, 1944, this would not suffice to bring into play the doctrine of collateral estoppel, since that issue was not "distinctly put in issue and directly determined" by the prior proceeding.

The net of it is that appellee's 1947 conviction has no

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in another action between the same parties upon a different claim or cause of action.

In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which might have been offered for that purpose.

* * * * *

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

effect on the issue of constitutionality in this case. It does represent a conclusive adjudication that he departed from and remained outside the United States to avoid liability for service; but his liability to prosecution for such conduct had fully ripened before the statute providing for expatriation was enacted in September 1944, and his prosecution for that offense is in no way inconsistent with the claim that he lost United States citizenship by continuing to remain outside the United States, during wartime, after September 1944.

II

Section 401(j) of the Nationality Act Is Constitutional

Section 401(j) decreed loss of United States nationality as a consequence of leaving the jurisdiction of the United States, or remaining outside it, during time of war or national emergency, for the purpose of avoiding service and training under the selective service laws.[10]

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[10] The provision is now embodied in Section 349(a)(10) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1481(a)(10). When it was included in the 1952 Act (enacted June 27, 1952, c. 477, title III, c. § 349, 66 Stat. 267), Congress added a presumption "that the departure from or absence from the United States was for the purpose of evading or avoiding training and service" in the armed forces, whenever it was shown that there was a "failure to comply with any provision of any compulsory service laws of the United States * * *." This presumption has been deemed by the Immigration and Naturalization Service not to be retroactive (Matter of F. —— M. ——, 6 I. & N. Dec. 379), and in any event does not affect this case because the facts were stipulated in the District Court.

The constitutionality of the substantive provisions of Section 349(a)(10) of the 1952 Act, but not of the presumption, is before the Court in *Rusk* v. *Cort*, No. 20. We are briefing in this case the basic issue of constitutionality raised in both cases, discussing in *Cort* only the aspects which are directly applicable to the facts there presented.

If, as we have shown in Point I, the government is not estopped to assert that the statute applies to appellee, there is no issue of fact in this case since appellee admitted by stipulation that he left the United States in 1942 solely for this purpose, and that he remained in Mexico subsequent to the effective date of Section 401(j) (September 27, 1944) until after the end of the fighting in World War II, solely for the same purpose. *Supra*, pp. 7-9.

It is our contention that the statute was within the power of Congress, as delineated by the decisions of this Court, in that it is a necessary and proper means of effectuating the express powers of Congress to wage war, to raise armies, and to provide for the common defense; within the implied power to enact legislation for the effective regulation of foreign affairs; and within the inherent powers of sovereignty. The statute satisfies the requirements of due process because a judicial determination is provided, in which a heavy burden of proof is cast upon the government. Finally, the statute does not apply any penal sanction; it is not punitive or vindictive in conception or application. It was enacted prospectively, with a view to regulating future conduct, rather than as an attempt to impose additional punishment upon one already chastised.

A. *The Constitution permits Congress to specify, in implementing its express and implied powers as well as the inherent powers of national sovereignty, acts which shall result in divestiture of citizenship, regardless of the subjective intent of the individual or of his aware-*

ness that he will lose his nationality by voluntarily performing the act.

1. The Constitution of the United States was, until the ratification of the Fourteenth Amendment, silent with respect to the methods by which individuals acceded to or lost United States citizenship, except for the provision that the federal government should provide for naturalization. Article I, Sec. 8, cl. 4. The Fourteenth Amendment referred to two methods by which citizenship is acquired—birth within the jurisdiction of the United States and naturalization. But at the time of the ratification of the amendment, a federal statute conferred citizenship upon children born abroad if their fathers were citizens of the United States who had previously resided in the United States; it also provided that women married to citizens of the United States were citizens. Thus, citizenship both by descent and by marriage, neither of which is specified in the Constitution, were permitted at the time of the ratification of the Amendment. Act of February 10, 1855, 10 Stat. 604, Rev. Stat. 1993; see *Weedin* v. *Chin Bow*, 274 U.S. 657. The acquisition of citizenship by descent continues to be permitted by Congress. 66 Stat. 235, 8 U.S.C. 1401.

The Constitution is still silent with respect to the means by which individuals may divest themselves of citizenship. Nonetheless, this country has long accepted the concept that an individual may divest himself of his original citizenship. On the day following the announcement of the ratification of the Fourteenth Amendment, the Fortieth Congress declared that "the right of expatriation is a national and in-

herent right of all people" and that any act of officers of the United States impairing that right was inconsistent with the policy of the United States. Act of July 27, 1868, 15 Stat. 223. See also *Reynolds* v. *Haskins*, 8 F.2d 473 (C.A. 8); *Charles Green's Son* v. *Salas*, 31 Fed. 106 (S.D.Ga.); Hay, *A Treatise on Expatriation* (1814). The United States rejected the principle of indefeasible allegiance in favor of the doctrine of the power of individuals to divest themselves of allegiance to the country of their original nationality.

The power of Congress to enact expatriation statutes, incidental to the exercise of its express powers, or in proper cases as an inherent attribute of sovereignty, has also been established by the decisions of this Court. In *Mackenzie* v. *Hare*, 239 U.S. 299, decided in 1915, the Court upheld the validity of a statute making marriage to a foreigner operative to suspend the American citizenship of the wife during coverture. It was contended that the statute must fall in the absence of an express constitutional grant. The Court answered (239 U.S. at 311):

> * * * But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. * * *

To the objection that this was to allow Congress the power to deem any act a renunciation of citizenship, the Court said (239 U.S. at 312):

> * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relationship lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.

In *Savorgnan* v. *United States*, 338 U.S. 491, decided in 1950, a woman who was a native-born citizen of the United States, while still within the United States, signed an oath of allegiance to the King of Italy in order to marry an Italian citizen. She subsequently went to live in Italy with her husband, but the trial court found that she had no intention of endangering her United States citizenship. This Court said, in affirming the holding of the court of appeals that Mrs. Savorgnan had expatriated herself (pp. 499-500):

> The petitioner's principal contention is that she did not intend to give up her American citizenship, although she applied for and accepted Italian

> citizenship, and that her intent should prevail. However, the acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

In 1958, *Perez* v. *Brownell*, 356 U.S. 44, held that Congress did not exceed the scope of its authorized powers in enacting that one who voted in a foreign election should thereby lose his American nationality. The Court stated that, for expatriation legislation, the underlying principle was whether a rational nexus existed between the content of a specific power in Congress and the action of the Congress in carrying that power into execution by withdrawing citizenship. It held that the withdrawal of citizenship could be reasonably related to the regulation of foreign affairs (356 U.S. at 58, 60-61), and that loss of nationality for voting abroad was so related (356 U.S. at 60-61, 62). The Court dismissed the argument that the person must actually have intended to give up his citizenship (p. 61):

> Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. * * * But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so.

Referring to the *Mackenzie* and *Savorgnan* cases, the Court went on to state (456 U.S. at 61):

> * * * Those two cases meant nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. * * *

2. In *Trop* v. *Dulles*, 356 U.S. 86, decided the same day as *Perez* v. *Brownell*, four members of the Court (speaking through the Chief Justice) held that to deprive an American citizen of his nationality for desertion whenever he had been convicted by court-martial and not subsequently reinstated by the military authorities—under Section 401(g) of the Nationality Act of 1940—was a cruel and unusual punishment in contravention of the Eighth Amendment. Mr. Justice Brennan's concurring opinion found no sufficient rational nexus between the war power or the foreign affairs power and the attempt by Congress to denationalize for desertion. He thought Section 401(g) too indirectly and remotely connected with the war powers to sustain its validity; and he noted that the provision was indiscriminately applicable to all kinds of conduct which amounted technically to the crime of desertion (whether the infraction occurred in this country or abroad) that it was essentially penal in nature and as such generally ineffectual, and that it was less effective than alternative sanctions not open to constitutional objection. 356 U.S. at 105-114. But it was made quite clear that the majority of the Court did not withdraw from the conclusion in *Perez* that

the government can, in proper circumstances, divest a man of his citizenship involuntarily. See the opinion of the Chief Justice in *Trop*, 356 U.S. at 93; Mr. Justice Whittaker's memorandum in *Perez*, 356 U.S. at 84; and Mr. Justice Brennan's concurring opinion in *Trop*, 356 U.S. at 105.[11]

3. The ultimate conclusions to be drawn from the holdings of the *Mackenzie*, *Savorgnan*, *Perez*, and *Trop* cases with respect to the power of Congress to decree loss of nationality are, we believe, these:

(1) Congress may decree loss of nationality as an incident to its control over foreign affairs on a ground which is reasonably necessary to the regulation of foreign affairs.

(2) Congress may decree loss of nationality under the war powers where the necessity for that sanction in the exercise of those powers is clear and direct.

(3) Congress may decree loss of nationality, under the sovereign powers of the United States as a government, where the individual's act may reasonably be found incompatible with continued allegiance to this country.

B. *Section 401(j) is a necessary and proper means of effectuating the foreign affairs power and the war*

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[11] Since the principle has now been established by the Court, we do not repeat the detailed arguments made in our briefs in *Perez*, *Trop*, *Savorgnan*, and other cases, in support of such Congressional power. See the Brief for the Respondent in *Perez*, No. 44, Oct. Term 1957 (No. 572, Oct. Term 1956), at pp. 10, *et seq.*; and the Supplemental Brief for the Respondents on Reargument in the *Perez*, *Nishikawa*, and *Trop* cases, Nos. 44, 19, and 70, Oct. Term 1957, at pp. 2, *et seq.*

power, as well as an appropriate exercise of the powers of sovereignty inherent in the United States.

Section 401(j) of the Nationality Act of 1940, and its successor statute, Section 349(a)(10) of the Immigration and Nationality Act of 1952, are Congressional responses to the felt need to deal with certain problems in the field of national defense, in our relations with foreign governments, and in vindicating the country's inherent right of sovereignty.[12]

1. *The History of the Statute*

a. Section 401(j) stems initially from Section 21 of the Act of March 3, 1865, 13 Stat. 490, providing for forfeiture of the rights of citizenship of enrolled draftees who departed from their districts or from the United States with intent to avoid military service (as well as deserters from the armed forces)—with mitigating provisions for those who returned before a certain date.[13] In 1912, this 1865 statute was amended

[12] It is clear that the *Perez* and *Trop* decisions did not include any ruling, express or implied, on Section 401(j). The majority opinion in *Perez* explicitly left open the "important question" of the constitutionality of Section 401(j). 356 U.S. at 62. As for *Trop*, two of the five justices constituting the majority indicated that they were not passing on the validity of Section 401(j); the memorandum of Mr. Justice Whittaker in the *Perez* case states that he neither expresses nor implies any views upon that provision (356 U.S. at 85), and Mr. Justice Brennan's opinion in the *Trop* case indicates that he was not passing on the validity of the section. See 356 U.S. at 110, esp. fn. 7.

[13] "• • • [A]ll persons who have deserted the military or naval services of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, *shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens;* and such deserters shall

to make it inapplicable in time of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172).[11] In our view, the 1865 Act, as originally enacted and as amended in 1912, was a true expatriation statute—withdrawing citizenship and nationality—although it referred to the "rights" of citizenship. See the discussion in the Appendix, *infra*, pp. 65-71.

b. After the 1865 Act was repealed by the 1940 Nationality Act, there was no legislation on the books dealing with expatriation for evading the draft by leaving the country. Section 401(j) was added to the 1940 Act in 1944, at the suggestion of Attorney General Biddle, in order to meet a need that arose after the institution of the draft in World War II. H. Rep. No. 1229, 78th Cong., 2d Sess., which accompanied the bill resulting in Section 401(j), spells out the circumstances, at pp. 1-2:

> It is, of course, not known how many citizens or aliens have left the United States for the purpose

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be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, *and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section.* * * *" (Emphasis added.)

[11] Section 401(g) of the 1940 Act—invalidated in *Trop*—provided for loss of nationality by those deserting the armed forces in time of war (54 Stat. 1169). This provision is apparently the reason for the total repeal of the 1865 Act which dealt both with deserters *and* with draft evaders. Provision with respect to draft evaders was resumed in 1944, see the text *infra*.

> of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.

And Attorney General Biddle's letter to the Congress stated (H. Rep. No. 1229, at pp. 2-3):

> Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.[15]

A representative of the State Department appeared

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[15] The Attorney General's letter also said, in part:

"The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. * * *

"* * * Any person who may be deemed to have become expatriated by operation of the foregoing provision, would be entitled to have his status determined by the courts pursuant to the above-mentioned section of the Nationality Act of 1940.

"Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356). * * *"

before the Committee and indicated that that agency had no objections to the proposal (H. Rep. No. 1229, *supra*, p. 2).

The bill was passed unanimously by the House (90 Cong. Rec. 3261-3263), favorably and unanimously reported by the Senate Committee (S. Rep. No. 1075, 78th Cong., 2d Sess.), and then passed unanimously by the Senate (90 Cong. Rec. 7628-7629). The House accepted a technical Senate amendment (90 Cong. Rec. 7725-7726), and the bill became law on September 27, 1944.[16]

2. *The Foreign Affairs Power*

Unlike Section 401(g), involved in *Trop*, Section 401(j) affects *only* draft-evaders who remove themselves from the United States. It is limited to those "who flee to another land" (see Mr. Justice Brennan, commenting on Section 401(g) in *Trop*, 356 U.S. at 107), and does not apply to draft-evaders who remain within this country. As a result, like Section 401(e) (the foreign-voting provision sustained in *Perez*), subsection (j) has a direct relationship to foreign affairs—a sphere of activity in which Congress has an especially large measure of power. See, e.g., *Burnet* v. *Brooks*, 288 U.S. 378, 396.

a. A draft-evader who leaves or remains outside this country to avoid military service can easily cause

[16] H. Rep. No. 1229, *supra*, p. 2, makes it clear that—unlike the 1865 Act—no court conviction would be necessary for expatriation under Section 401(j). First, there would be an administrative decision and, then, the individual would have access to the courts under the declaratory judgment procedure or, if necessary, by way of habeas corpus. See the discussion, *infra*, pp. 51 *ff.*

international complications. In the eyes of the foreign power, he would still be an American citizen for whom the United States would be deemed responsible (at least to some degree) even though it had no control over him, and on whom the United States could still impose demands even though he had fled this country. At the same time, the foreign country would have a substantial measure of interest in the fugitive now that he was resident on its soil, and might feel called upon to grant him various rights of protection.

In appealing to appellee and those like him to return to face their military obligations, or forfeit their nationality, Congress was seeking to avoid the international problems which could arise if this country attempted to effect the return of draft-evaders by requests to the foreign sovereign which that nation might be unwilling to grant. In times of war or national emergency, when the need for manpower for the armed forces is great, the United States could well feel called upon to make representations to, or bring pressure upon, certain nations to make sure that they do not become refuges or centers for American draft-evaders.[17] And to the bare need for military man-

[17] As already pointed out, in H. Rep. No. 1229, 78th Cong., 2d Sess., pp. 1-2, which accompanied the bill that became Section 401(j), the conditions existing in 1944 were pointed out as follows:

"It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war."

power there would be added the impetus of the sense of fairness to those who did answer the call to service.

Extradition treaties do not normally cover draft-evasion, and foreign countries do not feel obligated to expel men charged with such "political-type" offenses. A true embroilment could result, especially if the foreign country had become "host" to large numbers of evaders. And even if the United States contented itself with communications with the evader himself, he might seek the protection or intercession of the country of flight in the effort to avoid serving in our forces. Particularly if the fugitive leaves this country through disaffection or lack of sympathy for the war or defense program—a not unlikely possibility—will there be both opportunity and motivation for entangling the United States with the other nation. And if the other nation is unfriendly or adverse to American interests, it may be quick to seize upon our demands as a pretext for embarrassing this country.[18]

b. The problems are multiplied if the draft-evader is a dual-national. If he is a citizen of the country in which he seeks refuge—as is Mendoza-Martinez[19]—

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[18] On the prior appeal, appellee questioned the application to Section 401 (j) of the foreign affairs power since the section does not refer to foreign countries but is phrased in terms of "departing from or remaining outside the jurisdiction of the United States". The short answer is, of course, that, aside from the theoretical but unrealistic possibility of territory claimed by no nation, it is as yet impossible for any person to be in any portion of the globe outside the jurisdiction of the United States without being within the jurisdiction of some other country. Vessels and aircraft on or over the high seas are within the jurisdiction of the craft's flag.

[19] Appellee is also a national of Mexico (see the Statement, *supra*, p. 7). While the District Court pointed out, in its earlier opinion,

his actions, and our demands, could place the other nation in the difficult position of seeking a course of action which would protect its own nationals, while continuing friendly relations with another country which might be a strong ally. If the other nation were unfriendly, the difficulties that could arise are obvious.

In *Gonzales* v. *Landon*, 350 U.S. 920, the first case in this Court involving Section 401(j), the dual-national claimed, while living in Mexico (his other country), that he was exempt from American military service under an executive agreement between this country and Mexico, thus apparently seeking to play one of his countries off against the other. Extradition of such a dual-national would often be impossible even if the treaty could be read to cover the offense. Mexico, for instance, need not deliver up any Mexican national, according to the express terms of the extradition agreement between our two countries.[20] And if the evader were a dual-national, not of the "host" country, but of a third nation which asserted an objection to his return, there would likewise be international difficulties.

Although the section is not confined to dual-nation-

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that his conduct during his stay in Mexico was no different from that of other law-abiding Americans there on visas or passports (R. 10), this does not change the potential danger to foreign relations posed by the dual-national status of a draft-evader.

[20] See Article IV, Treaty of Extradition between the United States of America and the United States of Mexico, proclaimed April 24, 1899 (31 Stat. 1818 at 1822). Cf. 30 Am. J. Int. Law 480; Garcia-Mora, *International Law and Asylum as a Human Right*, p. 105 (1956); VI Hackworth, *Digest of International Law*, (1943), Sec. 578.

als, it is pertinent to note that thus far all the litigated cases we know in which individuals have finally been held to have been expatriated under Section 401(j) appear to have involved dual-nationals. (That is true of the three prior cases on Section 401(j) in this Court: *Gonzales*, 350 U.S. 920, *Perez*, and the present case; it is not true of the *Cort* case, No. 20). Congress was not compelled to restrict the statute narrowly and precisely to that category (see *Perez*, 356 U.S. at 59-60), but the grounding of the section in the foreign affairs power does gain added firmness from the fact that dual-nationals form so large a part of the statutory class. See *infra*, pp. 62-63.[21]

c. The potentiality of foreign entanglement through fugitive draft-evaders is not fanciful. American history is marked by international difficulties flowing from attempts to compel or prevent military service by young men. In the 19th century, there was a long involvement with other countries over the asserted continued liability of our naturalized citizens to military obligations imposed by their countries of birth. See III Moore, *Digest of International Law*, Secs. 434-440; Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), *passim*; *Perez* v. *Brownell*, 356 U.S. 44, 48. This was not the least of the causes of our first national war, with Great Britain in 1812. Moore, *op. cit.*, Sec. 434. Later, when this country first found it necessary to conscript for military serv-

[21] Congress was apparently aware of the greater incidence of draft-evasion among dual-nationals, when it adopted Section 401(j) in 1944. See 90 Cong. Rec. 3261-3262.

ice, in the Civil War, the government fell into the anomalous position of—

> resisting, on the one hand, their [foreign powers'] claims for the exemption from our military service of persons who appealed to their protection, and, on the other, the enforcing of claims for the exemption of the like class from military service in foreign countries, on the ground of their having acquired the rights of citizenship in the United States. [Letter of Sec. of State Seward to Motley, Apr. 21, 1863, Department of State, MS, "Instructions, Austria," (National Archives) I, 186; cited in Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), at p. 83.]

As in World War II, some Americans went abroad during that era for the purpose of evading the draft laws. Some of the same evaders who had returned to their native land, then called upon the American government for protection from foreign conscription. Seward to Judd, March 7, 1863, Dept. of State, *Foreign Relations*, 1863, pt. 2, p. 940.[22] There was not, during that period, any law forbidding flight in order to avoid service, but it appears that the reaction to these fugitives' calling upon the United States for protection against service abroad was one of the factors leading to the 1865 statute (discussed *supra*, pp.

[22] "Instances have occurred where Europeans, who have become naturalized citizens of the United States, have left the country when their services were required, and returned to Europe to avoid needful military duty here, and then have invoked the protection of the United States to screen them from military duty there."

34-35) providing for the forfeiture of the citizenship of anyone going beyond "the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered." Cf. Tsiang, *op. cit.*, pp. 83-84; Comment, *Constitutional Law—Citizenship—Power of Congress to Effect Involuntary Expatriation*, 56 Mich. L. R. 1142, 1152.

Appellee contended, on the earlier appeal, that the United States could easily avoid all such international difficulties by making no demands upon the foreign-based draft-evader or his country of refuge. But neither history nor this Court has limited the international complexities within the reach of Congress's foreign affairs powers solely to those arising from demands made upon us by foreign powers. The United States is not restricted to the passive role where its citizens are concerned; in appropriate circumstances it rightly makes suggestions, representations, even demands. The actions taken in Secretary Seward's day, cited immediately above, are examples; others are extradition requests and the protection afforded American persons and property against mistreatment in foreign lands. Similarly, in a time of emergency, when large numbers of draft-evaders are congregating in other countries (see *supra*, pp. 36, 38, for the situation in 1944), both the need for additional servicemen and the sense of fairness toward the men who do serve could properly impel the United States to take steps to obtain the return of the fugitives. The foreign affairs power covers all such dealings with foreign countries, whether the initial communication comes from the United States or from the other nation.

d. By expatriating those who depart from this coun-

try with draft-evasion as their purpose. Congress has eliminated at the outset any further claim that this country would have to the services of these individuals, and has removed all basis for further demands upon them or need to protect them—consequently reducing the danger of potential conflict with the nation to which they have gone. As Mr. Justice Brennan noted with respect to the voting provision of Section 401(e) (*Trop*, 356 U.S. at 106):

> * * * Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations. * * *

By the same token, Section 401(j) acts to avoid the possible areas of international dispute and conflict to which we have referred, and thus implements the regulation of foreign affairs; as such, it is a reasonable Congressional exercise of the foreign affairs power. "The termination of citizenship terminates the [international] problem." "The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose." *Perez*, 356 U.S. at 60.

3. *The War Power*

Section 401(j) is also sustained by its close and direct connection with the war power and with national de-

fense.[23] The power of the Congress to compel military service by a draft law is beyond dispute. *Lichter v. United States*, 334 U.S. 742; *Selective Draft Law Cases*, 245 U.S. 366.[24] That Congress may impose criminal penalties upon those who elect to avoid the compulsory service is also settled. *Falbo v. United States*, 320 U.S. 549. And where a person obligated to respond to the requirement of compulsory service frustrates the efforts to bring him to the service, and simultaneously prevents adjudication of his criminal liability for breaking the compulsory military service law, the Congress could reasonably conclude that there should be another means of enforcing its plan to provide equitably for the armed defense of the nation at the time when military manpower is most needed.

Unlike desertion, which carries the primary sanction of court-martial and imprisonment, no similar primary check exists to deter those individuals who flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country cannot be apprehended there and imprisoned for their departure or their failure to return. As indicated above (*supra*,

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[23] It does not detract from the validity of an expatriation statute that it finds support in both military and foreign affairs considerations. As was said in *Mackenzie v. Hare*, 239 U.S. 299, 311, concerning the statute there at issue:

> * * * It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. * * *

[24] That the federal government has the power to order our citizens abroad to return, for any lawful purpose, cannot be doubted since the decision of this Court in *Blackmer v. United States*, 284 U.S. 421. Indeed, the Court has also stated, by way of dictum, that it is the duty of every citizen to return to the United States upon the outbreak of hostilities. *The William Bagaley*, 5 Wall. 377 at 408.

pp. 39, 40), they are not normally subject to extradition.[25] Only if they return to this country after they have accomplished their purpose of avoiding service in time of danger is it possible to enforce criminal sanctions against their offense. This delayed punishment would not aid in raising an army when it is most necessary—during active hostilities. As the legislative history shows (*supra*, pp. 34-37), Congress felt that, for the difficult task of raising a wartime army, it needed the immediate deterrent of loss of nationality for evasion by flight abroad.[26] By its very nature, such evasion is always a serious offense, never a technical one (as desertion may be); a severe deterrent is appropriate.

At the same time, Congress could properly weigh the effect of its permitting draft-evaders to remain in a foreign sanctuary upon those who did answer the call and stood ready to give their lives, if need be, to defend the country. Inequality of sacrifice can be a potent destroyer of morale, sapping public confidence and individual integrity. Congress could well conclude that to permit a holder of the privileges of citizenship to absent himself during a time of danger, only to return in better days to accept modest criminal penalties and then resume his place in the community—like appellee who remained abroad until the fighting was

[25] In any event, when the existence of the country may be at stake, it would be intolerable for the government to be forced to rely primarily on the discretion of the foreign country as to whether it will or will not return the draft-evader.

[26] Even after flight abroad, Section 401(j) would act as a goad to quick return, since it has been liberally interpreted to the advantage of those who return (after initial flight) while the war or emergency still continues. See *infra*, pp. 59-61.

safely over, returned to plead guilty and serve a year in jail, and then attempted to pick up the thread of his life in this country would be to sanction conscienceless exploitation of the privileges of citizenship.

In sum, Congress could properly consider that denationalization in this type of case was a direct and necessary exercise of the war power; its judgment had warrant in the realities and was not at all unreasonable. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 93; *Korematsu* v. *United States*, 323 U.S. 214; *Lichter* v. *United States*, 334 U.S. 742.

4. *The Inherent Rights of Sovereignty*

The inescapable relationship between allegiance to the United States and citizenship was recognized in *Luria* v. *United States*, 231 U.S. 9, 22, in which the Court said:

> Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. * * *

The ultimate test of allegiance is submission to the lawful authority of the nation—not necessarily, of course, obedience to all the laws but, at the least, recognition of the power of the state to vindicate its authority through criminal or other compulsory process. When the power of the national legislature to raise armies by means of a draft law was challenged in this Court, in the *Selective Draft Law Cases*, 245 U.S. 366, the Court, affirming the criminal convictions of

those who refused to submit to the draft, stated (245 U.S. at 377-378):

> * * *. Further it is said, the right to provide [for the common defense] is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, *for a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power.* * * * [Emphasis added.]

The significant point in the case of the fugitive draft-evader is that not only does he reject the highest duty of citizenship—a call to service [27]—but he also refuses to submit to this country's jurisdiction over him. By deliberately keeping himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his prime duty of service, he repudiates his wider obligation as a citizen to submit to this country's jurisdiction and authority. He rejects all authority of the United States, not merely

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[27] Readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of United States citizenship, subject only to the most narrow exception of conscientious objection. The country's demand upon the citizen-soldier has been deemed the highest call to duty. This Court has characterized it as the "supreme and noble" duty (*Selective Draft Law Cases*, 245 U.S. 366, 390), and has recognized the primacy of military service, *when the citizen is called upon by Congress to perform it*, as *the* obligation of citizenship. Cf. *United States* v. *Schwimmer*, 279 U.S. 644; *United States* v. *Macintosh*, 283 U.S. 605; *United States* v. *Bland*, 283 U.S. 636; *In re Summers*, 325 U.S. 561, 572; *Girouard* v. *United States*, 328 U.S. 61, 64; *Falbo* v. *United States*, 320 U.S. 549; *Lichter* v. *United States*, 334 U.S. 742, 756-757.

his duty to serve. He may even pit the weight of the country to which he has fled—or of his other nationality, if he has dual-citizenship—against the power and right of the United States. Unless our government can cut its ties with the fleeing evader, as Section 401(j) requires, it will in reality be denied all power over him, just as *he* denies the government all power over his person. A government which cannot exert force to compel a citizen to perform his *lawful* duty is, to that extent, not sovereign as to him.

Effective jurisdiction can properly be considered by Congress as a necessary concomitant of citizenship. The Fourteenth Amendment itself makes it a prerequisite to citizenship that the person be "subject to the jurisdiction" of the United States.[28] Regardless of the crimes with which an individual may be charged, so long as he remains within the reach of our law enforcement agencies, within the enforcible reach of the process of our courts, his act does not strike at the very foundation of his relationship with his government, and with his fellow-citizens, in so drastic a manner as does the conduct of one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325.

If citizenship is a relationship comparable to a mutual compact (*Inglis* v. *Sailor's Snug Harbour*, 3

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[28] "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." (Emphasis added.)

Pet. 99, 124; *Luria* v. *United States*, *supra*), the fundamental articles of that agreement are the submission of the citizen to the jurisdiction of lawfully constituted government, and the agreement of the government to proceed within the confines of the powers delegated to it. The withdrawal of the individual from the most basic of the elements of that agreement—acceptance of United States jurisdiction and of the citizen's obligation to support the nation in time of emergency—terminates the reciprocal contract. At that point, complete dissolution of all of his ties to the nation cannot be deemed arbitrary.

We submit, in short, that there is a limit to the refusal to perform the obligations of citizenship, beyond which further refusal may justify the divestiture of that citizenship by Congress. That limit has been reached by appellee in the conjunction of the two elements here present: draft evasion plus deliberate absence from the jurisdiction of the United States in furtherance of that purpose. As was said in a different context in *Kawakita* v. *United States*, 343 U.S. 717 at 735-736:

> If he can retain that freedom and still remain an American citizen, there is not even a minimum of allegiance which he owes to the United States while he resides in the enemy country. That conclusion is hostile to the concept of citizenship as we know it, and it must be rejected. One who wants that freedom can get it by renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part

of the traitor. An American citizen owes allegiance to the United States wherever he may reside.

C. *Section 401(j) does not violate the Due Process Clause of the Eighth Amendment*

1. *There Is No Violation of Due Process*

a. It has been suggested that the statute offends due process because it is applied administratively, without a hearing or judicial proceeding, and that citizenship cannot be divested in that fashion. But the fact is that the statute attaches the consequence of expatriation to certain acts, and does not itself prescribe any procedure for determining whether or not those acts have occurred. True, the initial determination whether Section 401(j) has been brought into operation by a particular individual will often be made by the executive branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens.[29] This happens because the officials, like the courts, are required to enforce the statute and must apply it to the particular cases coming before them.

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[29] Appendix B to the Government's Brief in the *Perez* case (No. 572, Oct. Term, 1956, No. 44, Oct. Term, 1957) at pp. 62-63, points out that the Commissioner of Immigration and Naturalization reported that a total of 883 persons had been administratively deemed expatriated under Section 401(j) (or the comparable provision of the 1952 Act) for the eight-year period from July 1, 1948, to June 30, 1956. The Immigration and Naturalization Service reports that 122 persons were deemed expatriated between July 1, 1956, and June 30, 1960, because they departed from or remained away from the United States to avoid service in the armed forces.

The administrative ruling, however, is not the end of the story or even the main chapter. Under the Nationality Act of 1940, the individual was entitled to bring a declaratory judgment action to establish his citizenship. See Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171; *Perez* v. *Brownell*, 356 U.S. 44, 47, fn. 2; *Trop* v. *Dulles*, 356 U.S. 86, 123, fn. 3 (dissenting opinion). The trial was *de novo*, and once the plaintiff established the fact of his having been a citizen, the burden was on the United States to prove that he had lost that citizenship by "clear, unequivocal, and convincing" evidence which does not leave that issue in doubt. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. This standard of proof is comparable to that applied in a criminal case, and the plaintiff's rights were fully protected. If the United States were required to bring suit to divest appellee of his citizenship while he remained abroad, the spectacle of a trial *in absentia* would develop. As we have suggested (*supra*, pp. 44-51), it is the very fact that appellee put himself beyond the reach of our normal legal process that is the basis for this statute.[30]

b. Nor can appellee claim that he lacked notice that

[30] We discuss the administrative and judicial remedies available under Section 349(a)(10) of the Immigration and Nationality Act of 1952 in our brief in *Rusk* v. *Cort*, No. 20, this Term. The Immigration and Nationality Act of 1952 meets the requirements of due process in Section 360(b) and (c), providing for further administrative determination of the citizenship status of one found to have expatriated himself, and for ultimate judicial action by writ of habeas corpus. If a trial *de novo* is constitutionally required—an issue not presented in the *Cort* case—it may be had in the habeas corpus proceeding.

his act contravened the laws of this country, and that the ultimate sanction should not be applied for that reason. He has conceded knowledge of his obligations under the selective service laws, and that he deliberately flouted those laws, eventually leaving the jurisdiction of the United States, and remaining abroad until after the war for that very purpose alone. See *supra*, pp. 7, 8. Due process requires that a man be given notice of his obligations which is reasonable and available under the circumstances. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-315; *Blackmer* v. *United States*, 284 U.S. 421, 439, 443. Here, appellee, with deliberateness, put himself out of contact with the authorities, giving no notice that he was leaving and leaving no forwarding address. On the part of the government, the laws concerning selective service and expatriation were duly promulgated in the usual fashion. It may be assumed that appellee did not know the expatriative effect of his remaining abroad, and did not wish to expatriate himself. But he did know that to avoid military service was a violation of our laws, and he went and remained abroad "for the sole purpose of evading and avoiding" military service (R. 3). It is now settled that voluntary performance of an expatriating act is not excused by lack of knowledge that expatriation will result. *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491; *Perez* v. *Brownell*, 356 U.S. 44, 61-62 (all discussed *supra*, pp. 29-33).

2. *The Statute Does Not Impose Punishment, Nor Does It Violate the Eighth Amendment*

a. Punishment

(*1*). In *Trop*, five of the Justices held that Section 401(g), the desertion provision there involved, imposed punishment, and must be treated as such. We

submit that Section 401(j), in contrast, should not be so viewed, even under the criteria stated by the prevailing opinions in *Trop*.[31] The statute there found constitutionally defective operated only after the deserter had been caught and punished, and he could be punished by death or life imprisonment. Loss of nationality occurred only after the judgment of a court-martial had been entered, and only if subsequently the military authorities declined to reinstate the deserter. The desertion for which denationalization would result need have no element of removal from the jurisdiction of the United States; indeed, expatriation could result, under the statute, when the deserter had never been outside the United States. The offense could be quite technical (see Mr. Justice Brennan in *Trop*, 356 U.S. at 113), and need not have been serious. Moreover, expatriation of the deserter, after the event, could not avoid the harm of desertion except by acting as a deterrent (see 356 U.S. at 109-110), and that deterrent effect would probably be tenuous, in the Court's view, in the case of a capital offense like desertion. Likewise, there would be little or no effect on foreign affairs.

On the other hand, Section 401(j) looks to the future, to a far greater extent, and has important non-penal objectives of its own. Among the purposes of the statute are (a) the prevention of future embroilments with foreign nations (*supra*, pp. 37-44), and (b) the effort to persuade the evading fugitive to return to perform

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[31] In *Flemming* v. *Nestor*, 363 U.S. 603, 615, the Court pointed out that, although the majority in the *Trop* case characterized the statute as punitive, "no single opinion commanded the support of a majority. The plurality opinion rested its determination, at least in part, on its inability to discern any alternative purpose which the statute could be thought to serve. *Id.*, at 97. The concurring opinion found in the specific historical evolution of the provision in question compelling evidence of punitive intent. *Id.*, at 107-109."

his service or to submit to justice (*supra*, pp. 44-47). The criminal act, draft evasion, is not what invokes, in itself, the denationalization; instead, it is an act having no inherent criminal taint (*i.e.*, leaving or remaining outside the country) but which is always serious (and never merely a technical infraction) when coupled with draft evasion. The power of the sovereign is being used to persuade or induce the citizen to return to American jurisdiction for legitimate and important purposes. This is a regulatory, not a punitive, aim. Similarly, it is not punitive to sever the allegiance of those, like appellee, who have rejected all authority of the United States over them, by placing themselves wholly beyond its jurisdiction and power (*supra*, pp. 47-51). Such severance of allegiance recognizes a basic repudiation of citizenship which has already taken place.[32]

(2). In addition, the legislative history of Section 401(j) shows that punishment of draft-evaders was not the exclusive, nor the dominant, concern of the Congress which enacted it in 1944. The letter of Attorney General Biddle (see *supra*, pp. 35-36) treated the contemplated provision for what it was—a designation of loss-of-nationality rather than a penal measure. He carefully distinguished between "prosecution" for violation of the selective service laws and

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[32] On the face of the Nationality Act of 1940 and of the Immigration and Nationality Act of 1952, the Congress made a distinction between penal provisions and its designation of certain acts as involving loss of nationality. In the Act of 1940 the chapter entitled "LOSS OF NATIONALITY" followed, and was separated by only a single paragraph from, a whole section entitled "PENAL PROVISIONS" (54 Stat. 1163). In the Act of 1952, the chapter entitled "GENERAL PENALTY PROVISIONS" is Chapter 8 of Title II of the Act (66 Stat. 226), whereas the chapter entitled "LOSS OF NATIONALITY" is Chapter 3 of Title III (66 Stat. 267). See *Helvering* v. *Mitchell*, 303 U.S. 391, 404, with respect to the significance of the physical separation of non-penal provisions of a statute from the penal sanctions.

expatriation; "in addition" to criminal punishment, he said, it would be proper for fugitive evaders to lose their United States citizenship; he referred to them as not "worthy" of citizenship, just as doctors or lawyers who shirk their responsibilities may be determined not to be fit to retain their status and license. The stress, moreover, was on the draft-evaders' flight from the country, rather than on the draft-evasion by itself. It was the character of the expatriating act as a whole, in relation to the status of citizenship, that was the concern of the legislation, rather than punishment directed against those who commit or perform the act.

There were, it is true, individual references in debate to "penalties,"[33] but in appraising the action of Congress for constitutional purposes the looseness of common parlance cannot be allowed to outweigh the essential purpose and true nature of what was done. Colloquial language is not enough to convict Congress of deliberately contravening constitutional safeguards, at least where constitutional grounds for legislating exist. This Court has observed "that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground," *i.e.*, that a punitive purpose in fact lay behind the statute. *Flemming* v. *Nestor*, 363 U.S. 603, 617; *Communist Party* v. *Subversive Activites Control Board*, No. 12, O.T. 1960, slip op., p. 79, see also *Watkins* v. *United States*, 354 U.S. 178, 200; *Barenblatt* v. *United States*, 360 U.S. 109, 132; *Wilkinson* v. *United States*, 365 U.S. 399, 412.

(3). Thus, the structure and purposes of the statute, as well as the Congressional debates, show that punishment is not being imposed. And, as the Court has re-

[33] The terms "penalty", "penalties", "penalized" appear only in the Senate discussion. The House discussion was not phrased in any such terms.

cently reiterated, punishment is not involved merely because a consequence ensues which is financially, emotionally, or otherwise objectionable or harmful to the person affected, and which may incidentally add to the deterrent effect of the prison terms or fines which may be imposed as true criminal penalties for the conduct. See *Communist Party* v. *Subversive Activities Control Board*, No. 12, O.T. 1960, decided June 5, 1961, slip op., pp. 78-85; *Flemming* v. *Nestor*, 363 U.S. 603, 612-621; *De Veau* v. *Braisted*, 363 U.S. 144, 157-160 (plurality opinion); *Trop* v. *Dulles*, 356 U.S. at 124-125 (dissenting opinion).[34] The law knows many such disabilities or non-penal sanctions. See *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399-401; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 554-555; *Rex Trailer Co.* v. *United States*, 350 U.S. 148.[35] See also, *e.g.*, 18 U.S.C. 202, 205, 206, 207, 216, 218, 281, 282, 290, 593, 1905, 1907, 1908, 1912, 1913, 2381, 2383, 2385, 2387. "The penal and remedial provisions are, therefore, distinct and cannot be confounded" (*O'Sullivan* v. *Felix*, 233 U.S. 318, 324).

Civil regulations based on past conduct, even though the regulation is detrimental to the individual, are not invalid, or transformed into punitive sanctions, where they represent a *bona fide* exercise of regulatory power to accomplish a non-penal purpose, and are not de-

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[34] With respect to expatriation, Congress has always been aware that some of its enactments in this area may lead to severe or harsh results, and has therefore provided for various types of mitigation and amelioration. See the Supplemental Brief for the Respondents on Reargument in *Perez*, *Nishikawa*, and *Trop* (Nos. 44, 19, and 70, Oct. Term 1957), at pp. 7-11.

[35] These three cases involve, or refer to, the following non-penal sanctions: (a) disbarment; (b) deportation of aliens; (c) denial or revocation of a license to practice a profession, trade, etc.; (d) forfeiture of goods; (e) additional tax, customs, etc., penalties and "additions" to taxes or duties; and (f) statutory suits for liquidated damages for fraud.

signed to inflict punishment. Disbarment is a prime example. Cf. *Sacher* v. *Association of the Bar*, 347 U.S. 388. Another instance is furnished by *Hawker* v. *New York*, 170 U.S. 189, which upheld a state law preventing a doctor from practicing medicine, because of a criminal conviction occurring years before the statute was passed. See, also, *Barsky* v. *Board of Regents*, 347 U.S. 442. *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, made the same general ruling as to the refusal of public employment for prior subversive activity. Cf. *Adler* v. *Board of Education*, 342 U.S. 485; *United Public Workers* v. *Mitchell*, 330 U.S. 75; *American Communications Assn.* v. *Douds*, 339 U.S. 382; and the cases cited *supra*, p. 57. In short, there are many instances in which non-penal disabilities, disqualifications, or sanctions follow upon conduct which may also, in whole or in part, be criminal.[36]

This Court's decisions with respect to aliens involve, of course, considerations not applicable to citizens, but the holdings that deportation is not punishment (e.g., *Mahler* v. *Eby*, 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595; *Galvan* v. *Press*, 347 U.S. 522, 531; *Marcello* v. *Bonds*, 349 U.S. 302, 314) well illustrate the principle that severe consequences of, or disabilities imposed on, specified conduct do not *per se* constitute punishment. In the case of aliens, the sanction of deportation is imposed because Congress is "seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of security" (*Mahler* v. *Eby*, *supra*, 264 U.S. at 39).

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[36] See, generally, Note, *Punishment: Its Meaning In Relation To Separation of Power and Substantive Constitutional Restrictions and Its Use In The Lovett, Trop, Perez, and Speiser Cases*, 34 Ind. L.J. 231, 239-241, 249-251, 261-263, 270-271, 272-296

Similarly, denaturalization is not punishment. See *Klapprott* v. *United States*, 335 U.S. 601, 612; *Chaunt* v. *United States*, 364 U.S. 350, 353; *Politeo* v. *United States*, 364 U.S. 426.

In the present case, the disability of loss-of-nationality is imposed because Congress has determined that persons like appellee can no longer accurately be called American citizens. In these classes of cases deportation, denaturalization, and denationalization the determination may result in serious hardship. But the deportation and denaturalization cases show that severity of the resulting consequences is not indicative of punishment where those consequences have a relationship to a purpose independent of punishment, as is the case here in the aim to delineate those who shall no longer be treated as citizens of the United States. See, also, for other examples, *Fleming* v. *Nestor*, 363 U.S. 603, 612-621; *Communist Party* v. *Subversive Activities Control Board*, No. 12, O.T. 1960, decided June 5, 1961, slip op., pp. 78-85; *Rex Trailer Company* v. *United States*, 350 U.S. 148, 150-151 (in which fixed amounts of $2,000 on every count of a fraud recovery proceeding by the Government were held to be liquidated damages and not fines); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549; and the other cases cited *supra*, at pp. 57-58.

(4). A further indication that this statute is not punitive is the fact that the mental state required is different in kind from that usually found in a criminal statute. Section 401(j) makes expatriation depend on leaving or remaining outside of the United States "for the purpose" of evading or avoiding military service. This goes beyond a mere intent, commonly inferred from one's acts, that one intended to do what one did. The Immigration and Naturalization Service and the Board of Immigration Appeals have

required a showing that the dominant or primary motive in leaving or remaining away has been to avoid military service. When the evidence might fairly give rise to an inference that the primary motive was not to evade the draft, but, *e.g.*, to support one's family, or conduct one's business abroad, it has been found that citizenship was not forfeited, regardless of possible criminal penalties for draft evasion. See Matter of J—, Int. Dec. #979; Matter of G— M—, 2 I. & N. Dec. 861; Matter of M—, 2 I. & N. Dec. 910; Matter of G—, file # A-6544269 (B.I.A. 1947) (unreported decision; mere violation of selective service regulations was not sufficient to sustain finding of expatriation). The government's burden of proof has been recognized to be heavy. The case of J—, Int. Dec. # 979, *supra*, is illustrative. He left the United States for Mexico in early 1951 and failed to report for induction in May 1951, as ordered. After negotiating for draft deferments and related relief for six years, he agreed to return to the United States in 1957, provided an indictment for draft evasion would be suspended, pending an application to his draft board to be accepted for service. This was done, but the board rejected his application, apparently because he had since turned 26 (the reasons were not of record). The indictment was then pressed to a conviction, and J—, after serving his sentence and returning to Mexico, once again sought admission to the United States. After several intermediate decisions, the Attorney General ordered his admission as a United States citizen, apparently on the ground that J—'s testimony that he was in Mexico for the six years on legitimate business, and that he never wanted more than a short deferment, had not been successfully countered by the government's evidence, or by any logical inferences from his conduct.

Where the expatriative act relied on was remaining away after leaving the United States prior to the national emergency, there has been required a showing that the individual intended to come to the United States, and then refrained from doing so solely or primarily because he feared the military service obligation. Matter of M—, *supra*; Matter of A—S—, file = A-6450178 (B.I.A. 1955) (unreported decision; held, government failed to show a "desire" to come to the United States overcome by a reluctance to serve); Matter of S—, file = A-6661514 (B.I.A. 1947) (unreported decision); Matter of N—C—, file = A-10460191 (B.I.A. 1957) (unreported decision).

In the matter of G— R—, = A-6732816, 3 I.&N Dec. 141, in which a native-born citizen had been taken to Mexico and remained there for several years, entering and departing the United States once in 1945, and reentering subsequently as a United States citizen, it was held by the Board of Immigration Appeals that the government had not proved his intention to evade the draft. No determination was made as to his criminal liability, and the Immigration and Naturalization Service, in its Central Office Memorandum, took the position that criminal liability was not controlling on a determination of expatriation.

Conversely, the return of the individual to this country during the war or emergency makes it very difficult to show that he departed or remained abroad for the dominant or primary motive of evading the draft. See Matter of J—, *supra*. If appellee had returned before the end of the fighting, perhaps he, too, could have saved his American nationality.[37]

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[37] The unreported decisions of the Board of Immigration Appeals reveal a large number of cases in which, despite proof that a draft-evader had left or remained outside the country, it was held that he had not lost his citizenship, for reasons such as those mentioned

b. Cruel and Unusual or Invalid Punishment

We have urged above (*supra*, pp. 53-61) that the expatriation provided by Section 401 (j) should not be viewed as "punishment". But even if it is, we submit that it does not impose an invalid "punishment" or one contrary to the Eighth Amendment—at least as applied here.

(*1*). The general reasons why expatriation is not an improper "penalty" for those who flee the country to evade the draft have been outlined above (*supra*, pp. 53-59) at the outset of our argument why it is not a penalty at all. In particular, it is important, first, that, unlike desertion (as viewed by Mr. Justice Brennan in *Trop*, 356 U.S. at 112-113), flight to evade the draft must *always* be a very serious act, and, second, that Congress could validly consider that there are no practical or useful alternatives to denationalization.

(*2*). In appellee's case, it cannot be said that the result of the statute is to impose statelessness. Appellee is a Mexican national (*supra*, p. 7), and he retains that citizenship. He would not become stateless. We estimate that the majority of the cases in which Section 401 (j) has been applied have also involved dual-nationals of Mexico and the United States. The section was enacted in 1944 primarily because of the large numbers of men who had gone to Mexico (many or most of them, apparently, dual-nationals) to "sit

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in the text, *supra*.

These administrative interpretations have also been assumed or adopted by the courts when they have had occasion to pass on issues under Section 401(j). See, *e.g.*, *Gonzales* v. *Landon*, 350 U.S. 920; *Ponce* v. *McGrath*, 91 F. Supp. 23 (S.D. Cal.).

See, generally, Roche, *Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. of Pa. L.R. 25, 64; Sharon, *Loss of Citizenship by Draft Dodgers*, 5 I. & N.S. Monthly Rev. 97, 98 (Feb. 1948).

out" the war. See the legislative history, *supra*, p. 34-37. *Rusk* v. *Cort* (No. 20, this Term) is the only court decision of which we know in which a person who was a national of the United States alone has been held to fall within Section 401 (j), or the comparable provision of the Immigration and Nationality Act of 1952;[38] and, though statistics are not available, we believe that very few persons have been deemed administratively expatriated under the section who are not dual-nationals. The majority of the administrative cases appear to have involved men who were nationals of both the United States and Mexico.

(3). If it be thought that "punishment" cannot be imposed except after a criminal trial and conviction, that requirement is fulfilled here. Appellee has been tried and convicted of draft evasion, and he concedes that he fled and remained abroad in order to evade the draft. *Supra*, pp. 6-9. Even if it is punishment, there is no requirement that the consequence of expatriation be set out in the draft evasion statute, or that it be pronounced at the time of the criminal conviction or sentence. See *Gore* v. *United States*, 357 U.S. 386, 392-393; *Trop*, 356 U.S. at 122-123 (dissenting opinion); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 555-556 (concurring opinion).

CONCLUSION

For these reasons, we think that Section 401 (j) is sustained by considerations comparable to those which moved the Court in *Perez* v. *Brownell*, and that it does not fall under the strictures of the Justices whose views controlled *Trop* v. *Dulles*. The crucial factors here are: (a) the significant impact of draft evasion, by flight abroad, on this country's foreign affairs; (b) the ser-

[38] We discuss in our *Cort* brief the particular problem stemming from that fact.

ious and inequitable effect on the raising of an army; in time of war or emergency, of evasion of this type (which is never merely technical); (c) the complete repudiation by the fugitive draft-evader of this country's sovereignty over him; and (d) the absence of appropriate or effective alternatives to expatriation in these circumstances. It is these factors, in the main, which distinguish Section 401 (j) from the desertion statute Section 401 (g)) involved in *Trop* and evoke the authority of the *Perez* ruling and opinion.

It is therefore respectfully submitted that the judgment of the court below should be reversed and judgment ordered to be entered for the appellant.

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APPENDIX

The 1865 Act as an Expatriation Statute

The great weight of history, authority, and the other relevant aids to interpretation is to the effect that Section 21 of the Act of March 3, 1865, 13 Stat. 490, *supra*, pp. 34-35, was a loss-of-citizenship and loss-of-nationality statute, even though it referred only to the loss of "rights of citizenship."

1. The Act itself specifically decrees that *alien* deserters and draft-evaders shall forfeit "their rights to become citizens", thus indicating that citizenship itself (and not merely such rights as the franchise) was involved. Again, Congress took pains to prescribe that draft-evaders and deserters "shall be deemed to have voluntarily relinquished and forfeited" their rights. These are words appropriate to loss of nationality and loss of citizenship as such, rather than merely to the political rights appurtenant to citizenship; in the latter case, terms of voluntary relinquishment or forfeiture are not normally used but only an outright prohibition or prescription. Moreover, the Revised Statutes included the Act under the title of "Citizenship" (Title XXV) (Rev. Stats. 1996, 1998) along with the 1868 expatriation statute (Rev. Stat. 1999), and other provisions dealing with nationality.[1]

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[1] These provisions show that Congress has often used the terms "rights of citizenship" and "citizenship" interchangeably. For instance, Rev. Stat. 1993, providing for citizenship of children born abroad of fathers who were Americans at the time of the child's birth goes on to say: "but the *rights of citizenship* shall not descend to children whose fathers never resided in the United States" (emphasis added). See *Weedin* v. *Chin Bow*, 274 U.S. 657. And the Expatriation Act of 1868 itself says that "this Government has freely received emigrants from all nations, and invested them with the *rights of citizenship* * * *" (emphasis added). See also *Shelley* v. *United States*, 120 F. 2d 734, 735 (C.A.D.C.) (Act of July 2, 1940, 54 Stat. 715).

2. Administratively, the 1865 Act was likewise recognized as a loss-of-nationality statute. Early evidence of this historical fact is furnished by Secretary of State Hamilton Fish's answer, in 1873, to queries on the subject of expatriation directed by President Grant to all his Cabinet officers. In discussing the general question, Secretary Fish wrote (*Foreign Relations*, 1873, Part 2, p. 1187):[2]

> * * * and it will be remembered that Congress has asserted its right to *denationalize its own citizens*, and has defined one mode whereby the right of citizenship shall be forfeited, in the act of March 3, 1865, (13 Stat., p. 490,) which provides that, in addition to the other lawful penalties of desertion from the military or naval service of the United States, all persons who shall desert such service, or who, being enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, *shall be deemed to have voluntarily relinquished and forfeited their rights of citizenship, or to become citizens*, and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." [Emphasis added.]

The Citizenship Board of 1906 (see *Perez*, 356 U.S. at 49-50) considered it a statutory provision for loss of citizenship. See H. Doc. No. 326, 59th Cong., 2d Sess., p. 159. The State Department so construed it. See the remarks of Assistant Legal Adviser Flournoy at the

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[2] This was less than a decade after the passage of the 1865 Act.

hearings on the proposed Nationality Act of 1940 (Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess., on H.R. 6127, at pp. 38, 132-133; cf. 186-187) and III Hackworth, *Digest of International Law* (1942), pp. 276-279. The Cabinet Committee which proposed the 1940 Nationality Act (see *Perez*, 356 U.S. at 52-56) drew upon the 1865 statute as the parent of its suggestion as to expatriation for desertion (Hearings, *supra*, pp. 491-492). And when Attorney General Biddle proposed, in 1944, that Section 401 (j) be added to the 1940 Act, he mentioned that the comparable 1865 Act existed and was operative during World War I. See H. Rep. No. 1229, 78th Cong., 2d Sess. (quoted, in part, *supra*, pp. 35-36, 38). See also the letter of Secretary of War Stimson, dated March 6, 1943, recommending the provision which became Section 401 (g) of the 1940 Act, and referring to the prior law (the 1856 Act, as amended), as dealing with loss of "citizenship" which can be restored. S. Rep. No. 382, 78th Cong., 1st Sess., p. 10.

3. Several of the 19th century cases which applied the 1865 Act, in the context of the right to vote, also characterize the statute broadly as relating to citizenship itself. See *Gotchius* v. *Matheson*, 58 Barb. 152, 156, 157, 158, 159, 160 ("absolute forfeiture of citizenship," "forfeiture of citizenship", "deprive this class of persons of citizenship," "plaintiff's citizenship has been forfeited"); *Stevenger* v. *Healey*, 50 N. H. 448, 451 ("deprive any person of citizenship", per Jeremiah Smith, J.); *McCafferty* v. *Guyer*, 59 Pa. 109, 110 ("lost his citizenship under the Act of Congress of March 3d, 1865", per Strong, J.); *Huber* v. *Reily*, 53 Pa. 112, 114, 115, 116, 118 ("forfeiture of citizenship" (several

times), "deprivation of his citizenship of the United States", per Strong, J.).[3]

4. The legislative history of the original 1865 Act does not cast much light, one way or the other, on its precise meaning, but the history of the 1912 amendment (restricting its application to peacetime desertion) is clear that the Congress then recognized the provision as one for full loss of nationality.

(*a*). The pertinent 1865 provision—Section 21 of the Act of March 3, 1865; 13 Stat. 487, 490, ch. 79—actually formed a part of an omnibus military measure, passed in the very closing days of the Second Session, of the Thirty-Eighth Congress, which was entitled "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." But the recorded history of that particular measure hardly mentions this provision.[4] It is clear that Section 21 was taken, at the end of the session, from comparable portions of other military bills which had earlier passed the Senate and the House (in differing forms) but had not been enacted into law, and the section was then incorporated, with little discussion, in the omnibus bill together with other unrelated provisions which Congress desired to make law. The true history of the provision, such as it is, is found in the debates on those earlier unsuccessful bills—S. 408 (passed by the Senate only) and H. R. 678 (passed by the House only), of the 38th Congress, 2d Session.[5]

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[3] Mr. Justice Strong, later a member of this Court, took pains in his *Huber* opinion to point out that Congress could not legislate with respect to voting in the states.

[4] The Act of March 3, 1865, was H. Jt. Res. No. 170; see Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294-1295, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413.

[5] For the history of H. R. 678, as a whole, see Cong. Globe, 38th

The debates on the parts of those bills concerned with the loss of the rights of citizenship for desertion and draft-evasion stress the loss of the right to vote—disenfranchisement—and the inability to hold office as the primary consequences of the measure. See Cong. Globe, 38th Cong., 2d Sess., pp. 642-643, 1155; also p. 1378 (on the later provision in the omnibus bill). Such emphasis is quite understandable since, in 1865, that *was* the major consequence of the loss of citizenship; this country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens' deportation; the great difference between citizens and aliens was in the right to vote and to hold office. Nevertheless, Senator Hendricks, in opposing the provision, did characterize it in these general terms which unmistakably refer to citizenship, as such: "I submit to Senators that *it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor*, from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted." (Cong. Globe, 38th Cong., 2d Sess., p. 643); (emphasis added).

(*b*). The reports and the debate on the 1912 Act modifying the 1865 statute to apply only to peacetime desertions (Act of August 22, 1912, 37 Stat. 356)[6] are perfectly plain that Congress then viewed the 1865 statute as imposing loss of citizenship in the fullest sense, and

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Cong., 2d Sess., pp. 280, 298, 338, 974-980, 1034-1035; 1074, 1114, 1154-1155, 1160-1161, 1169.

For the history of S. 408, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572-573, 604-616, 609, 631-643.

[6] H.R. 17483, 62d Cong., 2d Sess.; H. Rep. No. 335; S. Rep. No. 910; 48 Cong. Rec. 2903-2905, 9542, 11131.

that Congress wished to continue that provision only for wartime desertions and draft-evasion.[7]

The House Report (H. Rep. No. 335, 62d Cong., 2d Sess., p. 2) dwells on the severity of the 1865 Act as applied to peacetime desertions, and declares that the effect of the 1865 Act

> has been, and will continue to be, so long as it remains on the statute book, *to make outlaws of thousands of American citizens* who, as boys or young men, from homesickness, dissatisfaction with military life, or without consideration of the fearful penalty imposed, desert from the Army or Navy.
>
> There are in the United States today *thousands of men who are literally men without a country* and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed.[8] [Emphasis added.]

On the floor of the House, Representative Roberts, the author of the bill, emphasized the harshness of the 1865 Act with respect to peacetime deserters, and repeated that "we have in this country today thousands upon thousands of young men of American birth who are literally men without a country"; he used the phrases "loss of citizenship", "now robbed of citizenship", and "loss of rights of citizenship" interchange-

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[7] The 1912 amendment left the draft-evasion provisions of the 1865 Act in effect, but they were, of course, inoperative from the Civil War to the passage of selective service legislation in World War I.

[8] This House Report also quotes from reports and communications of the Secretary of the Navy clearly revealing that he interpreted the 1865 Act as depriving deserters of citizenship.

The Senate Report (S. Rep. No. 910, 62d Cong., 2d Sess.) is not as explicit as the House Report, but it reveals the same understanding of the 1865 Act.

ably. 48 Cong. Rec. 2903-2904. He also referred to a provision in the bill for mitigation and clemency by the President as a provision that the President "could restore citizenship" in those cases "where it had been forfeited prior to the passage of the act". 48 Cong. Rec. 2904.[9] There is no doubt that the 1912 Congress—and prior Congresses in which similar ameliorative bills had been considered—understood the 1865 statute to provide for denationalization for desertion and draft-evasion.

[9] The Senate debate (48 Cong. Rec. 9542) was perfunctory, dwelling on a minor Senate amendment as to reenlistments.

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